SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 571

LEON F. CARROLL and DANIEL J. STEWART,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONERS' BRIEF

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Opinions Below

There was no opinion in the United States District Court for the District of Columbia.

The opinion of the United States Court of Appeals rendered May 3, 1956 is reported at 98 U.S. App. D. C., 244, 234 F2d 679, and is contained in the certified transcript of record.

The petition for re-hearing was denied by the Court of Appeals on May 22, 1956. (R. 3615)

Jurisdiction

The judgment of the United States Court of Appeals for the District of Columbia Circuit sought to be reviewed was dated and entered May 3, 1956. (R. 31)

The petition for re-hearing was denied May 22, 1956. (R. 36)

The jurisdiction of this Court is invoked under Section 1254 of Title 28 of the United States Code and Rule 37(b) of the Federal Rules of Criminal Procedure.

Statutes Involved

United States Code

§ 28-1291. Final decisions of district courts.

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

United States Code

§ 28-1292. Interlocutory decisions.

The courts of appeals shall have jurisdiction of appeals from

(1) Interlocutory orders of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District Court of The Canal Zone, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed;

(4) Judgments in civil actions for patent infringement which are final except for accounting.

United States Code

§ 18-3731. Appeal by United States.

An appeal may be taken by and on behalf of the United States from the District Courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

From a decision arresting a judgment of conviction for insufficiency of the indictment or information, where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

From a decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy.

An appeal may be taken by and on behalf of the United States from the District Courts to a court of appeals in all criminal cases, in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof ex-

cept where a direct appeal to the Supreme Court of the United States is provided by this section.

From a decision arresting a judgment of conviction except where a direct appeal to the Supreme Court of the United States is provided by this section.

The appeal in all such cases shall be taken within thirty days after the decision or judgment has been ordered and shall be diligently presented.

Pending the prosecution and determination of the appeal in the foregoing instances, the defendant shall be admitted to bail on his own recognizance.

If an appeal shall be taken pursuant to this section, to the Supreme Court of the United States, which, in the opinion of that Court, should have been taken to a court of appeal, the Supreme Court shall remand the case to the court of appeals, which shall then have jurisdiction to hear and determine the same as if the appeal had been taken to that court in the first instance.

If an appeal shall be taken pursuant to this section to any court of appeals, which in the opinion of such court, should have been taken directly to the Supreme Court of the United States, such court shall certify the case to the Supreme Court of the United States, which shall thereupon have jurisdiction to hear and determine the case to the same extent as if an appeal had been taken directly to that Court.

District of Columbia Code—1940 Edition

§ 23-105 [6: 355] Appeals by United States and District of Columbia.

In all criminal prosecutions the United States or the District of Columbia, as the case may be, shall have the same right of appeal that is given to the defendant, including the right to a bill of exceptions; Provided; That if on such appeal it shall be found that there was error in the rulings

of the court during a trial, a verdict in favor of defendant shall not be set aside. (Mar. 3, 1901, 31 Stat. 1341, ch. 854, § 935.)

District of Columbia Code—1940 Edition

§ 17-102 [16: 27] Court of Appeals—Appeals from Interlocutory orders in criminal case prohibited.

Nothing contained in any Act of Congress shall be construed to empower the United States Court of Appeals for the District of Columbia to allow an appeal from any interlocutory order entered in any criminal action or proceeding or to entertain such appeal heretofore or hereafter allowed or taken. (July 3, 1926. 44 Stat. 831, ch. 755.)

Federal Rules of Criminal Procedure, Rule 41(e).

(e) Motion for Return of Property and To Suppress Evidence

A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without a warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the ground on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be

made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

Statement of the Case

On February 12, 1954, officers of the Metropolitan Police Department executed certain affidavits upon which search warrants for various premises and arrest warrants for certain persons, including appellants herein, (R. Pg. 12) were issued by the United States Commissioner for the District of Columbia.

The arrest warrants for the appellants were executed on February 16, 1954. On April 26, 1954, an indictment (R. Pg. 3) was returned by the Grand Jury charging the petitioners, Leon F. Carroll and Daniel J. Stewart, together with one Norman H. Hall and one Sylvester C. Williams (neither of whom is a present party herein, the indictment as to them having been dismissed), with conspiracy in violation of the United States Code and with various violations of gambling statutes of the District of Columbia.

The petitioners upon arraignment respectively entered pleas of not guilty and thereafter filed motions to suppress evidence (R. Pg. 12) allegedly seized from their persons at the time of the arrest, on the grounds that there was lacking adequate probable cause for the arrests and searches and that petitioners' rights under the Fourth and Fifth Amendments to the Constitution had been violated. Similar motions were filed on behalf of Norman H. Hall and Sylvester O. Williams, the two individuals indicted along with the petitioners.

On January 10, 1955, which was prior to the trial date, the United States District Court for the District of Columbia (Chief Judge Bolitha J. Laws) denied the motions with re-

spect to the defendants Hall and Williams, but granted the motions with respect to the evidence obtained by virtue of the arrests of appellants Leon F. Carroll and Daniel J. Stewart (R. Pg. 12). The Court held that the warrants of arrest had been issued without probable cause.

From the order suppressing the evidence as to the appellants the United States of America appealed to the United States Court of Appeals for the District of Columbia Circuit. The Court of Appeals reversed the District Court and its judgment was entered on May 3, 1956. (R. 1) A petition for rehearing was denied by an order entered May 26, 1956. (R. 36)

Question Presented

Does the United States of America have the right to appeal from an order of the United States District Court for the District of Columbia suppressing evidence in a criminal case where the motion to suppress and the order are filed and entered after the indictment and prior to trial?

Summary of Argument

Where a motion to suppress evidence is filed after indictment and before trial in a criminal case, an order granting same is interlocutory, and the United States has no right to appeal therefrom.

Argument

The question whether an adverse ruling on a motion to suppress evidence[1] after indictment and prior to trial is appealable by a defendant in a criminal case has been an-

[1] A critical distinction has been made between a ruling on 'motion to suppress' on the one hand and on a 'motion to return property' on the other, the former being universally held to be interlocutory and the latter in some circumstances to be final. Cf. Steele v. U. S. 267 U. S. 498, 69 L.Ed. 757.

swered in the negative by this Court in the Cogen case.[2] No special legislation is invoked by the Court below, nor does any such warrant exist to permit such an appeal from a ruling where the government, rather than the defendant, complains of such a ruling adverse to it. However, contrary to the import and direct language of the *Cogen* case, supra, the court below comes to a contrary and erroneous conclusion, by adverting to the rationale of three decisions of this court,[3] and adopting the following criteria for determining the 'finality' of an otherwise, at least, purely interlocutory order:

> (a) if it has a 'final and irreparable effect on the rights of the parties', being a 'final disposition of a claimed right';
>
> (b) it is 'to important to be denied review'; and
>
> (c) the claimed right 'is not an ingredient of the cause of action and does not require consideration with'.

The court below justified its entertainment of the appeal in the instant case upon its own decision in *United States v. Cefaratti*, 91 U. S. App. D.C. 297, 202 F2d 13. The holding in *Cefaratti*, supra, represents the first, and only attempt to establish an order granting a Motion to Suppress evidence as a sufficiently final order to be covered by 28 U.S.C. (Supp. v.) § 1291. The rationale of the court was that (1) the appealed order had a final and irreparable effect upon the rights of the parties because it made acquittal inevitable if the government had gone to trial, and the government would have no appeal from that acquittal; (2)

[2] Cogen v. United States, 278 U. S. 221, 73 L.Ed. 275, at page 281; "The orders made on such applications, *so far as they effect the rights only of parties to the litigation, are interlocutory.*" (Emphasis supplied)

[3] Cohen v. Ben. Industrial Loan Corp. 337 U. S. 541; Swift v. Compania Col. Del Caribe, 339 U. S. 684 and Stack v. Boyle, 342 U. S. 1.

that it was too important to be denied review because under Rule 41(e), Federal Rules of Criminal Procedure, the property would not be admissible in evidence at any hearing or trial; and (3) that the claimed right to have the evidence returned "is not an ingredient of" and "does not require consideration with" the criminal charge against him.

But the Circuit Court fails to consider whether or not the order finally determined claims of right "separable from, and collateral to, rights asserted in the action . . . and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated," and this appears to be the fourth critical element in the test of finality for purposes of appeal as outlined by the three cases.

It is to be noted that the Court in *Cefaratti*, supra, in determining whether the appealed order was or was not "an ingredient of" the criminal charge, speaks of ". . . appellee's right to have the narcotics returned to him."

The Order in this case is one granting a Motion to Suppress Evidence—not a Motion for the Return of Property; so obviously, the doctrine in *Cefaratti*, even if sound, could not apply.

Fundamentally, rulings on the use and admissibility of evidence in a criminal case are universally considered to be an integral part of a trial and inextricably interwoven into the fabric of the case on the merits as contradistinguished from the nature of a constitutional right to bond,[4] a statutory attachment,[5] or statutory right to security for costs.[6] Obviously the *Stack*, *Cohen* and *Swift* cases turned on matters which were not an indispensable and indisputable ingredient of trials generally. While no particular evidence is indispensable, the government is necessarily and always

[4] Stack v. Boyle, supra.

[5] Swift v. Compania, etc., supra.

[6] Cohen v. Ben. Loan Corp., supra.

restricted by the poverty of its own efforts. (*United States v. Janitz*, 161 F2d 19).

Petitioners suggest that the criteria of finality outlined in *Cefaratti*, supra, is an emasculated version of the requirements of finality as established by this Court in the *Cohen* and *Swift* cases, supra. The collateral nature of the matter concerned on appeal is then a sine qua non.

But even applying the abbreviated standard adopted by the Circuit Court appellants find it impossible to conceive of a ruling affecting the admissibility of evidence in a case as anything other than an ingredient of the cause of action itself.

This fact is buttressed by the very contention of the government that without the suppressed evidence its case fails. How can any factor collateral to a cause be at the same time vital to its maintenance?

It is the contention of the appellants that the proper rule would call for rejection of the *Cefaratti* holding. Petitioners find reassurance for this position in the latest expression of this Court on this matter in the case of *Baltimore Contractors, Inc., v. Bodinger*, 394 U. S. 176, 99 L.Ed. 233, at page 238 (January 1955). This Court seems to justify the rationale of the late Chief Judge Stephens in his dissenting opinion in the *Cefaratti* case, supra, by pointing out that any enlargement of the appellate jurisdiction should be a legislative, and not a judicial product. The language, because of its pertinency, and because the case was decided on January 10, 1955, with the *Cohen*, *Swift* and *Stack* cases in mind, as is evidenced by note 4, at 99 L.Ed. 237, would seem to gainsay the conclusion of the majority in the *Cefaratti* case, and support the view of the dissent. Beginning at page 238 of 99 L.Ed. and page 181 of 348 U. S., this Court says:

> "... No discussion of the underlying reasons for modifying the rule of finality appears on the legislative his-

tory, although the changes seem plainly to spring from a developing need to permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence. When the pressure rises to a point that influences Congress, legislative remedies are enacted. The Congress is in a position to weigh the competing interests of the dockets of the trial and appellate courts, to consider the practicability of saving in time and expense, and to give proper weight to the effect on litigants. When countervailing considerations arise, interested parties and organizations become active in efforts to modify the appellate jurisdiction. *This Court, however, is not authorized to approve or declare judicial modification. It is the responsibility of all courts to see that no unauthorized extension or reduction of jurisdiction, direct or indirect, occurs in the federal system. Shanferoke Coal & Supply Corp. v. Westchester Service Corp. 293 U. S. 449, 451, 79 L.Ed. 583, 586, 55 S. Ct. 313. Any such ad hoc decisions disorganize practice by encouraging attempts to secure or oppose appeals in the legislative domain. They are enlargement of the allowable list of appealable interlocutory orders; abandonment of fragmentary appeals; or a general allowance of such appeals in the discretion of the trial judge upon findings of need, with or without the consent of or approval of the appellate court.*" (Emphasis supplied)

The Court below stated that "two counts of the indictment allege that the appellees had in their possession on the date they were arrested the numbers paraphenalia suppressed, it therefore, seems obvious that, at least with respect to those two counts in this case, as in *Cefaratti*, without the suppressed evidence the prosecution cannot succeed." Several questions of a serious nature arise.

Is Chief Judge Laws' Order of Suppression a final decision and thus appealable as to the misdemeanor counts of "possession," and at the same time not a final order and thus not appealable as it relates to the remaining felony counts of the indictment, since possession of the suppressed evidence is not an indispensable element of the felonies, but only a desirable evidentiary aspect of the government's case? Again, embracing the *Cefaratti* doctrine (including its lack of agreement with *Rossenwasser*, *Janitz* and *One Plymouth Coupe*, 161 F. 2d 3) can the government appeal on the mere representation that it will not be in possession of *sufficient evidence* to go forward successfully and consequently will dismiss the indictment because of its reluctance to proceed with a weak case which in all probability will be lost?

This is a dangerous innovation, because "*sufficient evidence*" by governmental standards can be a most relative thing. Anything less than *no evidence* fails to meet the *Cefaratti* test. We respectfully submit that the decision in the instant case is a classic example of the type of "ad hoc decisions" against which this Court cautions in the *Bodinger* case, supra.

There is no doubt that if the questions were decided during the trial, the ruling would be interlocutory and not independently appealable. The hearing prior to trial does not change the nature of the question nor its relationship to the case, and does not transmute the ruling into "final decision." *Waldron v. U. S.*, U. S. App. D. C. 12,075, January 13, 1955.

Finality does not depend on the right to obtain review after judgment, but upon the nature and relationship of the ruling made to the case in which it is entered. To be final for purposes of appeal under 28 U.S.C.A. 1291 a ruling must decide all litigated matters on the merits as contra-

distinguished from a preliminary order of the kind made in *Stack*, *Swift* and *Cohèn*, supra, deciding a matter that would not be an issue at trial. The order below falls in neither category and is not a final decision since the proceedings are clearly part of the trial. *Waldron* v. *U. S.*, supra and *Gatewood* v. *U. S.*, 93 App. D. C. 226.

That the Government would have no right to obtain a review of the ruling after judgment is of no importance since a statute restricts the Government's rights. Section 23-105, D. C. Code, 1950 Edition,[6a] removes from the scope of review available to the Government after judgment rulings at trial on questions of evidence. To hold that the order below is appealable would be to enlarge and expand the limits of review in criminal cases and in this instance would give the United States a right it has never had before. *United States* v. *Sanges*, 1892, 144 U. S. 310, 12 S. Ct. 609, 36 L.Ed. 445.

The right to review is a matter of legislative grace. The only authority for review prior to judgment is 28 U. S. C. A. 1292 which is not applicable here and which is strictly construed. Therefore, to hold in this case that a ruling on the admisibility of evidence is independently reviewable does not extend the *Cohen* and *Swift* doctrine, but creates a new one.

The Circuit Court of Appeals for the District of Columbia Circuit took a lone position in *Cefaratti*, supra, and with its decision in the instant case remains unique in this respect. At the time of the decision in 1952 the *Cogen* doctrine had been applied to this type of situation by the Third Circuit in *United States* v. *Janitz*, supra; by the Seventh Circuit in *United States* v. *One Plymouth Coupe*, 161 F. 2d 3; and by the Ninth Circuit in *United States* v. *Rosenwasser*, 145 F. 2d 1015, 1017.

[6a] Lette 17, Section 102, 1951 Ed. D.C. Code.

Then significantly, in 1955 (Nov. 7) three years after *Cefaratti*, supra, the Fourth Circuit decided a case on all fours with *Cefaratti*, except that the evidence was illicit liquor instead of narcotics, i.e. *United States* v. *Williams*, 227 F. 2d 149. In this latter case the Fourth Circuit Court of Appeals was as displeased with the Order granting suppression of the evidence as was the District of Columbia Circuit in *Cefaratti*, and devoted much space to pointing out that the District Court committed clear error; but then faced the issue of appealability and decided that the Order was interlocutory, citing this Court's *Cogen* case. It is to be presumed that Judge Parker was aware of *Cefaratti*, but significantly he did not treat with it at all.

Petitioners are puzzled and unable to resolve the positions taken by respondent when it urges the existence of statutory warrant for such appeals in this cause; while at the same time it decries the want, and beseeches the enactment of such legislation by the Congress.[7]

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[7] Hearing Before the Senate Subcommittee of the Committee on the Judiciary, 84th Congress, 2d Session, May 4, 1956 on S. 3760 (*Narcotic Control Act of 1956*) Suggestions and recommendations from Dept. of Justice by Deputy AG.

Section 1409 provides in substance, that the United States shall have the right to appeal from an order granting a motion to suppress evidence or return seized property made prior to the trial of a person charged with a violation of sections 1402, 1403, or 1404 of the bill, or with a violation of section 2 of the Narcotic Drugs Import and Export Act, or with a violation of any section of the Internal Revenue Code of 1954, . . . This section further provides that the United States attorney taking an appeal from an order granting such a motion shall certify to the judge who granted the motion that the appeal is not taken for purposes of delay and that the prosecution is unable to go forward without the evidence suppressed. . . .

The principal effect of this section is to work an amendment to the Criminal Appeals Act (18 U. S. C. 3731). *Since, in the present state of the law, an order suppressing evidence entered after an indictment or information is filed is interlocutory in character and not appealable (e.g., United States v. Janitz, 161 F.2d 19 (C. A. 3), this section proposes a salutary change in the right direction. In limiting the right to appeal, however, to orders to suppress or to return evidence entered before trial*

Conclusion

It is respectfully submitted that the court below committed error when it entertained the Government's appeal from the Order of the District Court suppressing evidence in the pending criminal proceeding, since such Order was interlocutory, and not final within the contemplation of applicable statutes.

Wherefore, it is submitted that the decision of the court below should be reversed.

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(3706-9)

only in narcotic cases and then only when the Government can certify that such evidence is indispensable to going forward with the prosecution, this section fails to achieve the desired reforms of the Criminal Appeals Act contained in H. R. 9364 and S. 3423 (84th Cong., 2d Sess.).

Because H. R. 9364 and S. 3423 will apply to all criminal cases, including those covered by section 1409 of the subject bill, and will give the Government a broader right to appeal than does section 1409, they appear to be preferable to that section. These bills, with their expanded rights of appeal, would, when applied to narcotic cases, provide more effective enforcement and prosecution than would section 1409 of the subject bill. (Congress turned a deaf ear to this plea) [Emphasis supplied].

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 571

LEON F. CARROLL AND DANIEL J. STEWART, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Appeals (R. 31–34) is reported at 234 F. 2d 679. The opinion of the District Court (R. 12–14) is reported at 126 F. Supp. 620.

JURISDICTION

The judgment of the Court of Appeals was entered May 3, 1956 (R. 35). A petition for rehearing was denied on May 22, 1956 (R. 35–36). The petition for a writ of certiorari was filed on June 21, 1956, and on November 13, 1956, this Court granted the petition, limited to the question set forth below (R. 36).

QUESTION PRESENTED

Does the United States of America have the right to appeal from an order of the United States District

Court for the District of Columbia suppressing evidence in a criminal case where the motion to suppress and the order are filed and entered after the indictment and prior to trial.

STATUTES INVOLVED

28 U. S. C. 1291, 62 Stat. 929 (1948), as amended by 65 Stat. 726 (1951), provides:

> *Final decisions of district courts*
>
> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

28 U. S. C. 1292, 62 Stat. 929 (1948), as amended by 65 Stat. 726 (1951), provides:

> *Interlocutory decisions*
>
> The courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed;

(4) Judgments in civil actions for patent infringement which are final except for accounting.

18 U. S. C. 3731, 62 Stat. 844 (1948), as amended by 63 Stat. 97 (1949), provides:

Appeal by United States

An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

From a decision arresting a judgment of conviction for insufficiency of the indictment or information, where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

From the decision or judgment sustaining a motion in bar, when the defendant has not been

An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section.

From a decision arresting a judgment of conviction except where a direct appeal to the Supreme Court of the United States is provided by this section.

The appeal in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted.

Pending the prosecution and determination of the appeal in the foregoing instances, the defendant shall be admitted to bail on his own recognizance.

If an appeal shall be taken, pursuant to this section, to the Supreme Court of the United States which, in the opinion of that Court, should have been taken to a court of appeals, the Supreme Court shall remand the case to the court of appeals, which shall then have jurisdiction to hear and determine the same as if the appeal had been taken to that court in the first instance.

If an appeal shall be taken pursuant to this section to any court of appeals, which, in the opinion of such court, should have been taken directly to the Supreme Court of the United States, such court shall certify the case to the Supreme Court of the United States, which

shall thereupon have jurisdiction to hear and determine the case to the same extent as if an appeal had been taken directly to that Court. [As amended May 24, 1949, c. 139 § 58, 63 Stat. 97.]

Rule 41 (e), Federal Rules of Criminal Procedure, provides:

(e) *Motion for Return of Property and to Suppress Evidence.* A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

District of Columbia Code 23–105, 31 Stat. 1341 (1901), provides:

> *Appeals by United States and District of Columbia.*
>
> In all criminal prosecutions the United States or the District of Columbia, as the case may be, shall have the same right of appeal that is given to the defendant, including the right to a bill of exceptions: *Provided,* That if on such appeal it shall be found that there was error in the rulings of the court during a trial, a verdict in favor of the defendant shall not be set aside.

District of Columbia Code 17–102, 44 Stat. 831 (1926), as amended by 48 Stat. 926 (1934), provides:

> *Court of Appeals—Appeals from interlocutory orders in criminal case prohibited.* Nothing contained in any Act of Congress shall be construed to empower the United States Court of Appeals for the District of Columbia to allow an appeal from any interlocutory order entered in any criminal action or proceeding or to entertain such appeal heretofore or hereafter allowed or taken.

STATEMENT

On February 12, 1954, officers of the Metropolitan Police Department of the District of Columbia executed an affidavit in support of applications for arrest and search warrants, describing a surveillance of petitioners Carroll and Stewart and of two other persons,[1] extending over a period of almost two months. The

[1] These were Norman H. Hall and Sylvester O. Williams, who became co-defendants, but who are not now parties. All defendants except Hall were identified in the affidavits by description and designated "John Doe."

affidavit (R. 17–24) related how, on twenty different occasions, the officers had observed the four individuals engage in various activities typical of persons engaged in a "numbers" operation. The incidents and activities were minutely described in the lengthy statement. On the basis of this affidavit and of the applications, the United States Commissioner for the District of Columbia issued arrest warrants for the four individuals and search warrants for certain premises connected with the illicit operation (R. 15). The warrants were executed by the arrest of the persons described therein and by a search of the premises. Lottery slips and other gambling paraphernalia were seized both from the persons and on the premises (R. 16–17).

On April 26, 1954, an indictment was returned in the District Court for the District of Columbia, charging petitioners Carroll and Stewart with being "concerned as owners, agents and clerks, and in other ways, in managing, carrying on and promoting a lottery known as the numbers game," in violation of 22 D. C. Code 1501; with conspiring to do so, in violation of 18 U. S. C. 371; and with knowing possession of "numbers slips," in violation of 22 D. C. Code 1502 (R. 3–8). Hall and Williams were charged in the same indictment with similar and connected offenses.[2]

[2] Hall and Williams were indicted with petitioners for conspiracy to violate the gambling laws of the District of Columbia; and for violation of Section 1501 of Title 22, District of Columbia Code. Hall and Williams were further charged in separate counts with violating Section 1502 of the same title; and with maintaining gambling premises in violation of 22 D. C. Code 1505.

Thereafter, the defendants filed motions to suppress the evidence seized from them at the time of their arrest (R. 9); and motions to suppress as evidence and return the property seized during the search of the premises (R. 11–12).

The District Court granted the motions to suppress filed by petitioners with respect to the property taken from them at the time of their arrest, and also granted the motions to suppress and return with respect to property seized from the premises located at 1121 First Street NW., and at 1714 V Street NW., but denied the motions to suppress filed by the co-defendants Hall and Williams, and the motion to suppress and return insofar as it related to premises located at 2001½ 18th Street NW. (R. 12–14).

The Government appealed from the adverse portion of the order of the District Court. In the Court of Appeals, the Government asserted that it was unable to go forward with its case against petitioners without the evidence that had been suppressed, offering to stipulate that, if the order of suppression should ultimately be sustained on appeal, the indictment against Carroll and Stewart would be dismissed (R. 33).

Petitioners moved in the Court of Appeals to dismiss the appeal for lack of jurisdiction (R. 29–30). The court found that it had jurisdiction of the appeal, holding that the order of the District Court was a "final decision." By reference to its previous decision in *United States* v. *Cefaratti*, 202 F. 2d 13 (C. A. D. C.),[3] the court further held that there was

[3] A petition for hearing *en banc* to reevaluate the *Cefaratti* decision was filed on February 20, 1956 and was denied by the full court on March 21, 1956.

statutory authority for the appeal (R. 32–33). On the merits the court found that there was probable cause for the issuance of the arrest warrants, and accordingly it reversed the order of the District Court (R. 31–34).

SUMMARY OF ARGUMENT

I

Section 105 of Title 23 of the District of Columbia Code provides that in all criminal prosecutions the Government shall have the same right of appeal that is given to the defendant except that a verdict of acquittal shall not be set aside. By virtue of Section 102 of Title 17 of the District of Columbia Code, only final orders are appealable. Orders entered prior to trial which direct the suppression of seized property are not verdicts of acquittal and do constitute final orders (as we show in Point III, *infra*). Section 23–105 therefore clearly authorizes appeals from such orders. The Act represents a definite expression of congressional desire to grant broad appellate rights to the Government in the District of Columbia, no doubt induced by the knowledge that police problems exist locally that may not be present in the general federal jurisdiction. For that reason there is no inconsistency between the local statute and the subsequent federal criminal appeals laws which are not explicit with respect to suppression decisions. Moreover, since the Court of Appeals for the District of Columbia Circuit—which has the responsibility for interpreting local law (*Fisher* v. *United States*, 328 U. S. 463)—has expressly construed Section 23–105 to permit appeals by the Government from orders of suppression

(*United States* v. *Cefaratti*, 202 F. 2d 13), it is clear that, whatever the rule may be elsewhere, at least in the District of Columbia orders of suppression are by statute made reviewable by the appellate court.

II

Section 1291 of Title 28, United States Code, confers upon the courts of appeals jurisdiction to review all "final decisions." Orders on motions to suppress ~~the~~ ARE appealable pursuant to that section, notwithstanding that they are not among the few appealable orders in criminal cases listed in Section 3731 of Title 18, United States Code, for the reason that such orders are final and are so separate and distinct from the criminal case that they assume a plenary, independent quality. Their separability and independence is established and emphasized by the factual, legal, and procedural gulf which separates the issues involved in the suppression matter from the issues involved in the criminal case as such. See Rule 41 (e), F. R. Cr. P.

A further statutory basis for review exists in the power of the court of appeals to instruct the district court by writ of mandamus in the application of the correct rule of law with respect to defense motions to suppress. Cf. *La Buy* v. *Howes Leather Co.*, 352 U. S. 249. Although here the Government appealed rather than proceeding by mandamus, substance rather than form should prevail.

Not only in the District of Columbia, therefore, but in the federal courts generally, orders granting motions to suppress have a statutory basis for appeal.

III

A decision directing the suppression of seized property is a "final decision" for purposes of Section 17–102 of the District of Columbia Code and within the meaning of 28 U. S. C. 1291. It is final (1) because but for an appeal immediately after its entry there can be no review of such a decision and (2) because it has a final and irreparable effect on an important right of the Government, a right which is collateral to and separable from the rights involved in the criminal case itself. *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541. Without the right of appeal the Government would be totally helpless to obtain review of a decision profoundly affecting one of its important rights—and no countervailing policy, such as that against double jeopardy, is operative here.

ARGUMENT

I

IN THE DISTRICT OF COLUMBIA, THE GOVERNMENT HAS A RIGHT OF APPEAL IN CRIMINAL CASES FROM ALL FINAL ORDERS OTHER THAN A JUDGMENT OF ACQUITTAL

The issue here is whether in a gambling ("numbers") case, involving principally violations of District of Columbia statutes, the Court of Appeals for the District of Columbia Circuit has jurisdiction to entertain an appeal from an order of the District Court (entered prior to trial) suppressing the numbers paraphernalia which represent the very foundation of the prosecution's case.[4] Two questions govern

[4] As the record shows, more than a mere suppression of evidence was involved in the decision from which the appeal

resolution of the issue: (1) whether there is specific statutory authority for the taking of an appeal from the type of order here involved; and (2) whether the order is "final" in quality. These problems will be discussed *seriatim.*

A. SECTION 105 OF TITLE 23 OF THE DISTRICT OF COLUMBIA CODE CONFERS JURISDICTION FOR APPEALS FROM SUPPRESSION ORDERS

Section 105 of Title 23 of the District of Columbia Code provides that:

> In all criminal prosecutions the United States or the District of Columbia, as the case may be, shall have the same right of appeal that is given to the defendant, including the right to a bill of exceptions: *Provided,* That if on such appeal it shall be found that there was error in the rulings of the court during a trial, a verdict in favor of the defendant shall not be set aside.

This statute indicates a definite congressional policy to grant broad appellate rights to the Government in criminal cases arising in the District of Columbia. It represents a deliberate legislative departure from earlier concepts that the Government could not appeal criminal matters.[5] Section 105 is not unlike many state enactments which provide for appeals by the state in criminal cases and which confer rights which are sometimes far broader than those provided here. See, *e. g., Palko* v. *Connecticut,* 302 U. S. 319. Nor is it surprising that the District of Columbia is

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was taken. That decision included a direction to return certain seized property. See note 17, on p. 21, *infra.*

[5] Cf. *United States* v. *Sanges,* 144 U. S. 310.

equated with a state in this respect. In the District the Government is vested with police powers and duties much like those of state governments. Its law enforcement functions are by no means limited to general federal crimes—of the three statutes allegedly violated in this case only one is federal in character. See p. 7 *supra*. Moreover, the local Criminal Appeals Act applies not only to the United States but to the District of Columbia Government as well—and it could hardly be construed to grant greater rights to one entity than to the other.

If the spirit of Section 105 favors appealability, its language equally strongly embodies that concept. In fact, the statute so affirmatively and inclusively grants the Government the right to appeal as to admit of few exceptions. Since the Government's right is expressly declared to be the same as that of the defendant, the only qualifications contained in the statute or which might read into it are (1) that the order being appealed from be a final order,[6] and (2) that a verdict in favor of the defendant not be set aside by the appellate court. The second qualification (which has been construed to preclude an appeal by the Government where the double jeopardy provision of the Constitution would render the appeal moot, *United States* v. *Evans*, 30 App. D. C. 58, certiorari quashed, 213 U. S. 297, is not applicable here. The

[6] See Section 17-102 District of Columbia Code *supra*, p. 6 and *United States* v. *Cefaratti*, 202 F. 2d 13 (C. A. D. C.). The finality of decisions on motions to suppress is demonstrated in Point III, *infra* pp. 31-53.

clause that the Government "shall have the same right of appeal that is given to the defendant" is not a limitation upon the Government's right to appeal in the instant situation, although obviously the defendant in a criminal case must await the judgment of conviction before he can have review of pretrial errors. A defendant's inability to obtain an immediate appellate ruling is bottomed not upon grounds related to the instant statute but upon lack of finality of the order adverse to him. As the Court of Appeals for the District of Columbia Circuit has stated:[7]

> It is immaterial that if the District Court had *refused* to suppress the evidence its order would not have been final and therefore would not have been appealable. Since defendants may appeal from "final decisions", to say that "the United States * * * shall have the same right of appeal that is given to the defendant * * * *Provided,* That * * * a verdict in favor of the defendant shall not be set aside" means that, subject to an exception not relevant here, the United States may appeal from final decisions. It does not mean that the United States cannot appeal from a final decision unless it so happens that an opposite decision would also have been final.

Moreover, the defendant ultimately will have a right to appeal from an order on a suppression motion that is adverse to him—that is, he will have the right to appeal from such an order as a part of his appeal if he is convicted.[8] If he is acquitted, the Government

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[7] *United States* v. *Cefaratti*, *id.* at 17. Footnote omitted.

[8] Cf. *United States* v. *Heinze*, 218 U. S. 532, 545–6. See p. 46, *infra*.

cannot appeal. Therefore, if the Government is to have the "same right of appeal that is given to the defendant" it must appeal at this stage of the proceedings or never.

Furthermore, it is significant that the Court of Appeals for the District of Columbia Circuit has considered this precise issue and has specifically construed Section 105 to permit Government appeals from suppression orders. *United States* v. *Cefaratti*, 202 F. 2d 13, 17, certiorari denied, 345 U. S. 907. Since this determination constitutes an interpretation of a purely local statute by the court having responsibility for construing local law, and since the construction is not an unreasonable one, it should not be disturbed by this Court. *Fisher* v. *United States*, 328 U. S. 463, 476; *Griffin* v. *United States*, 336 U. S. 704, 712–716.

In view of its plain language, the policy of which it is the expression, and the construction given to it by the highest court of the District, Section 105 provides the necessary jurisdictional basis for the instant appeal.

B. SECTION 105 OF TITLE 23 OF THE DISTRICT OF COLUMBIA CODE HAS NOT BEEN REPEALED, OR MODIFIED IN A MANNER SIGNIFICANT TO THIS CASE

Six years after adoption of the District statute, Congress passed a federal Criminal Appeals Act.[9] That statute did not, however, repeal Section 105. In *United States* v. *Burroughs*, 289 U. S. 159, 162, it was held that, in the District of Columbia, the United States could not appeal directly to this Court under

[9] 34 Stat. 1246 (March 2, 1907).

the federal Criminal Appeals Act because that Act "is inapplicable to criminal cases tried in the Supreme Court of the District. These are regulated solely by § 935 of the Code."[10] Thus, when *Burroughs* was decided, regardless of the type of decision the Government was appealing, only the local statute applied.[11]

Thereafter, in the Act of May 9, 1942 (56 Stat. 271), Congress specifically named "the United States Court of Appeals for the District of Columbia" along with the circuit courts of appeals, as courts to which the United States may take an appeal in certain named instances. This amendment, however, did not repeal Section 105 of the District of Columbia Code any more than that section had been repealed by the 1907 Act. Nothing in the legislative history of the 1942 statute indicates that, by its reference to the United States Court of Appeals for the District of Columbia, Congress intended to curtail existing appeal rights. Apparently, that court was referred to in the statute only in light of its changed status as a regular circuit court of the United States.

Nor was the local statute repealed by the Act of June 25, 1948 (62 Stat. 844), or that of May 24, 1949 (63 Stat. 97), codifying Title 18 of the United States Code, and revising that title, respectively.

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[10] The Supreme Court of the District is now the United States District Court for the District of Columbia; § 935 of the Code is now Section 105 of Title 23 of the D. C. Code.

[11] When Congress enacted the original federal Criminal Appeals Act, it was cognizant of the Government's right to appeal criminal cases in the District of Columbia under the local Code. See S. Rep. No. 5650, 59th Cong., 2d Sess., p. 1.

The legislative history of the 1949 amendment is illuminating on the continued force and effect of the local appeal statute. The Act of May 24, 1949, included a complete schedule of statutes in the District of Columbia Code thereby repealed because inconsistent with Title 18 or Title 28 of the United States Code. H. R. Rep. No. 352, 81st Cong., 1st Sess., accompanying the bill (H. R. 3762), lists as a purpose of the Act (p. 1) to repeal "inconsistent and superseded laws."[12] The same report, referring to Section 142 (the repeal section), states expressly (p. 22) that the law was intended to, and did, repeal those sections of the District of Columbia Code which "are obsolete, or are inconsistent with or superseded or covered by provisions of revised titles 18 and 28, U. S. C., or by the Federal Rules of Civil Procedure." Section 105 of Title 23 of the D. C. Code, here involved, is not included in the schedule.

This statutory history reveals that Congress never expressly repealed the statute embodied in Title 23, Section 105, District of Columbia Code. And from the fact that it passed a specific repeal statute, eliminating obsolete, inconsistent, superseded, or otherwise covered provisions of the local code, it is manifest that no repeal by implication was intended.[13]

Nor is there any intrinsic repugnancy between the present federal Criminal Appeals Act[14] and the local

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[12] S. Rep. No. 303 81st Cong., 1st Sess., p. 1, is to the same effect.

[13] "* * * the existence of a specific repealer is evidence of an intent that further repeals (by implication) are not intended by the legislature." 1 Sutherland *Statutory Construction* (3d ed.), § 2015. See *Buffum* v. *Chase National Bank*, 192 F. 2d 58, 61 (C. A. 7), certiorari denied, 342 U. S. 944.

[14] 18 U. S. C. 3731 *supra*, pp. 3–5.

statute insofar as an order of suppression is concerned. The latter provision may be said to be superseded *pro tanto* as concerns such decisions as orders dismissing indictments or orders in arrest of judgment, because Section 3731 of 18 U. S. Code mentions them specifically.[15] That statute does not, however, deal with an order of suppression. Assuming, therefore, that before the Criminal Appeals Act affected the District of Columbia (cf. *United States* v. *Burroughs, supra* at p. 15), the United States possessed the right to appeal an order of suppression, this right remains. The Criminal Appeals Act, as amended, directly regulated only the type of appeals it named, leaving in the residue of appellate jurisdiction an order of suppression. Section 3731 of Title 18 of the U. S. Code provides that the United States may appeal in some named instances to a court of appeals and in others to this Court. Section 3731 allows appellate jurisdiction in specified cases; it does not even purport to restrict or narrow appellate power elsewhere granted. In short, a statute conferring a right of appeal to the Supreme Court in instance A, and a right of appeal to a court of appeals in instance B, is certainly not repugnant to a statute permitting a general appeal, in instances A, B, and C, and does not repeal, by implication, such power in reference to instance C. Compare *State* v. *Harlock*, 185 Ark. 807, 49 S. W. 2d 611, 612–3.

At least in the District of Columbia, therefore, a statutory foundation exists for an appeal by the Gov-

[15] See *United States* v. *Hoffman*, 161 F. 2d 881 (C. A. D. C.), reversed on other grounds, 335 U. S. 77.

ernment from an order of the District Court suppressing, or suppressing and requiring the return of, property seized by an officer of the law in connection with a criminal case.

II.

THERE IS FEDERAL STATUTORY AUTHORITY FOR REVIEW

A. SUPPRESSION ORDERS ARE APPEALABLE UNDER 28 U. S. C. 1291

The jurisdiction of the Court of Appeals to entertain appeals from suppression orders is not dependent solely upon District of Columbia law. A separate federal statutory basis for such jurisdiction exists.

28 U. S. C. 1291 allows appeals from all final decisions, without limitation to civil cases or private parties. In Part III, *infra*, pp. 31–53, it is demonstrated that an order suppressing seized property is a "final" decision within the meaning of Section 1291. If that be so, then such an order is appealable on the strength of Section 1291 alone, unless the order must be regarded as an integral part of the criminal case for the purposes of the Criminal Appeals Act. This Act (18 U. S. C. 3731) permits the Government to appeal in criminal cases from certain specified orders, and orders granting motions to suppress are not among those listed. Otherwise stated, if an order suppressing property (or one suppressing property and directing its return) is plenary and independent of the criminal case in which it happens to have been entered, then its appealability would not be barred by the Criminal Appeals Act which specifically affects only "criminal cases." As will be seen hereinafter, not all orders having a relationship to a criminal case

are considered to be so much a part of that case as to be reviewable on no basis other than that provided by the Criminal Appeals Act. We will show that the type of order with which we are here concerned need not be so considered.

It is clear that in a factual, evidential sense, there is no mutual dependence between the suppression issue and that of guilt or innocence of the defendant. The former is restricted to the reasonableness or lack of reasonableness of the action of the judicial officer issuing the warrant or that of the police officer conducting the arrest or the search, whereas the latter has to do with the actions of the defendant and his conduct with respect to the laws of the state. The legal standards applied differ: on the one hand, determination is made whether a law enforcement officer had probable cause for the belief that a crime had been committed; on the other, whether the guilt of the defendant of such crime was proved beyond a reasonable doubt. The issues are handled wholly separately by court and counsel, frequently by different judges at different times,[16] with different considerations in mind. There are no factual, legal, or practical obstacles to holding that the suppression matter is separate from and independent of the principal cause of action. As the Supreme Court of California has written in a like situation, "the contention, which we think is maintained by the great weight of author-

[16] Rule 41 (e), F. R. Cr. P., specifies that "The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing."

ity, is that the proceeding for such recovery is independent of the criminal proceeding in which it is sought to use such articles as evidence" for the reason that the right to recovery is a proceeding to enforce a civil right, involving "separate issues of fact as to the rights of possession of the goods and the method of seizure, by whom taken, and whether or not the trespass was committed by an agent of the state." *People* v. *Mayen*, 188 Cal. 237, 251–252, 205 Pac. 435, 441.[17]

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[17] The *Mayen* case refers specifically to proceedings for the recovery of property, but its reasoning is equally applicable to motions seeking only the suppression of seized property. See pp. 22–30, *infra*. Moreover, contrary to petitioners' assertion that no question of appealability of orders directing the return of property is here involved (Br. 9), that question is very much a part of this case. Each of the petitioners filed a "Motion to Suppress—Arrest Warrant" (R. 9) and joined in a "Motion to Suppress Evidence *and Return Property*" seized from certain premises (R. 11). (Emphasis added.) The District Court accordingly ruled that "The motions to suppress evidence *and return property* as to the premises 1121 First Street, N. W., and 1714 V Street, N. W., and to suppress arrest warrants for John Doe #1 and John Doe #3 will be granted * * * (R. 13). (Emphasis added.) It is from this decision, which clearly included a direction to return property, that the Government appealed, and it is this decision which the Court of Appeals reversed (R. 35). It would be erroneous to contend that since petitioners were not in possession of the premises in question, as to them the issue presented by the motion to suppress and return is moot. Since they joined in the motion to suppress and return the property seized from the First Street and V Street premises, they should not be allowed to disclaim that they had a proprietary interest in at least some of the property found there. Cf. *Irvine* v. *California*, 347 U. S. 128, 136; *Harvey* v. *United States*, 90 App. D. C. 167, 193 F. 2d 928; certiorari denied, 343 U. S. 927. That fact alone would justify the continued viability of the "suppress and return" portion of the issue. Mootness is further precluded because the property seized

While this Court has not had occasion to pass directly on the issue of separability of an order suppressing evidence entered subsequent to the finding of a criminal indictment, it has ruled on collateral matters in a way which supports a decision favoring separability here, and so have several of the courts of appeals.

It is well settled, for example, that if a suppression motion is filed prior to the return of an indictment, the suppression matter is separate from the criminal case and independently appealable. *Go-Bart Importing Co.* v. *United States,* 282 U. S. 344, 356; *Perlman* v. *United States,* 247 U. S. 7; *Burdeau* v. *McDowell,* 256 U. S. 465. This rule has been applied, even in the Third and Ninth Circuits,[18] as well as elsewhere, to hold that an order on a suppression motion is independently appealable even though it be entered after the return of a criminal indictment if only the motion was filed prior to such return. *In re Sana Laboratories,* 115 F. 2d 717 (C. A. 3), certiorari denied, 312 U. S. 688; *Freeman* v. *United States,* 160 F. 2d 69 (C. A. 9); *United States* v. *Poller,* 43 F. 2d 911 (C. A. 2). And where the motion is filed and acted upon prior to indictment but subsequent to an arrest connected with the criminal charge (*Perlman* v. *United States, supra; United*

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from the premises would be admissible in petitioners' own trial at least on the conspiracy count. Accordingly, the appealability of the District Court decision as a whole, including that portion which directs a return of property, is here in issue. However, in the view of the Government, that factor is not vital to the appealability of the decision which would be reviewable even if no return were involved.

[18] See pp. 34–35, *infra.*

States v. *Bianco*, 189 F. 2d 716, 717, note 2 (C. A. 3); cf. *Weldon* v. *United States*, 196 F. 2d 874 (C. A. 9)), or where it is filed and acted upon prior to indictment but an indictment is then returned prior to the taking of an appeal (*Centracchio* v. *Garrity*, 198 F. 2d 382 (C. A. 1), certiorari denied, 344 U. S. 866), the matter likewise is considered plenary and appealable. To hold that an order entered in any one of these situations is distinct and independent but that an order entered upon motions filed after the return of an indictment is indistinct and inseparable is essentially unreasonable and illogical. The purpose of such motions filed prior to the bringing of an indictment is identical with that of motions filed after the happening of that event, *i. e.*, prevention of the use of certain property in a criminal case pending against the moving party or about to be brought against him.[19] The right sought to be vindicated likewise is the same in the two instances: immunity from illegal search and seizure. That in the one instance the criminal case has already begun while in the other it is merely

[19] In the typical case, the moving party's sole interest in the property is to prevent its use in an impending criminal case. But for the expectation that an indictment will issue, most motions for suppression and return would never be made. This certainly is true of the cases dealt with in the decisions mentioned above which held the orders in question appealable on the theory that the motions had been filed prior to the indictment. In all of them, suppression in the criminal case, not some civil right of return, was the object. And since in most such controversies the property is contraband, it could not be returned in any event, so that suppression for purposes of the criminal trial can be the only objective of the motion, whether it be made prior to or subsequent to the return of a formal indictment.

threatened, or that in the one case the motion formally is entitled in the criminal matter whereas in the other it is not so entitled, are factors of no real significance. To base a difference in result thereon would be to prefer technicality over substance. Nor can the time sequence (as between indictment and motion) give rise to a theory of "interruption" of the criminal case (which has been the usual justification for the distinction). For if an interruption occurs, it is the action of the district court which causes it, exactly as the action of the District Court in ordering the return of documents held by the Government for grand jury use was held in *Burdeau* v. *McDowell, supra*, to be a court-caused interruption of the grand jury's inquiry and appealable. See *Cobbledick* v. *United States*, 309 U. S. 323, at 329, note 6.[20]

There is not, in any event, any real alteration of the essentials of the motion by its juxtaposition with the indictment. Rule 41 (e), F. R. Cr. P., does not even relate the motion to the criminal case. Rather, it makes the property suppressed or returned unavailable in evidence "at any hearing or trial"—contemplating an effect not merely on the immediate criminal case but on, perhaps, many other judicial proceedings. Of course, the trial of the pending criminal case will be affected by the order. But the Rule does not limit that effect to the criminal prosecution in which, *per accidens*, such an order may be passed.

That this is so was exemplified and highlighted in the recent decision in *Rea* v. *United States*, 350 U. S.

[20] Compare *Segurola* v. *United States*, 275 U. S. 106, 111–112.

214. There, the petitioner had been indicted in federal court on a narcotics offense. He moved under Rule 41 (e) to suppress certain evidence and the motion was granted, as a result of which the indictment had to be dismissed. No motion for return of property was made; indeed, the property was contraband and thus not returnable. Subsequently, petitioner was charged in a New Mexico court with possession of the same narcotics in violation of a New Mexico statute. Petitioner thereupon moved in the federal District Court to enjoin the federal narcotics agent from testifying in the state court with respect to the suppressed property. The District Court denied the motion and the Court of Appeals affirmed, but this Court reversed, holding that in view of its supervisory power it could prohibit the use of property suppressed under Rule 41 (e) in proceedings wholly unrelated to the criminal case in which the suppression had occurred. And the Court specifically referred to the federal Rules (obviously Rule 41) as supplying the basis for the exercise of the Court's power. In view of the fact that an order granting suppression has such a wide reach, it can hardly be regarded as being only in and of the criminal case in which the motion happens to have been made. See, also, *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385. To say that it is not in and of the criminal case is, of course, equivalent to saying that it is a plenary matter, not governed by the restrictions of the Criminal Appeals Act (18 U. S. C. 3731) which is applicable only to orders entered in and as part of criminal cases.

Additionally, Rule 41 (e) emphasizes the separateness of the suppression issue both by directing that, whenever possible, the motion "shall be made before trial or hearing," and by permitting the motion to be made in a district other than that in which the trial will be held—*i. e.* where the property was seized. For example, an indictment may be returned in the district court in Baltimore, based on a seizure made in the District of Columbia.[21] After the return of the Maryland indictment, the defendant may apply for and obtain an order from the District Court for the District of Columbia for the return of the seized property. Surely, the order of the District Court for the District of Columbia should not be regarded as subordinate to the criminal case solely because of the pending Baltimore indictment.[22] If, as the courts have held, a suppression order is plenary if no criminal prosecution is pending anywhere, it should not lose its plenary attributes if criminal proceedings have been instituted against the owner of the property either in federal court or in a court of any state of the United States.

Petitioners say that *Cogen* v. *United States,* 278 U. S. 221, stands for this very proposition. True, there is language in *Cogen* which suggests that the Court then considered an order on a suppression motion to deal with a matter non-distinct from the general subject of the criminal litigation, but this was said in the context of an appeal by the defendant

[21] Cf. *Oliver* v. *United States*, decided January 9, 1957 (C. A. 8).
[22] Cf. *Weinberg* v. *United States*, 126 F. 2d 1004 (C. A. 2).

rather than by the Government.[23] An analysis of the reasons assigned in support of the decision reveals that the Court was primarily concerned with and essentially decided, not the statutory problem under discussion under this point of the brief, but rather the issue of finality of the order of the District Court—an issue which is dealt with *infra* at pp. 31–53.

Moreover, *Cogen* stands for the general proposition that "[w]hether a motion is to be treated as independent and plenary or as merely a procedural step in a pending trial must be determined by particular circumstances." *United States* v. *Wallace Co.*, 336 U. S. 793, 802. The following relatively slight factual or procedural variations were said in *Cogen* to be sufficient, without more, to establish the independent character of the proceeding "even where the motion is filed in a criminal case": (1) when the application is made by a stranger to the litigation; (2) when the motion is filed before there is an indictment against the movant; (3) when the criminal proceeding contemplated or pending is in another court; (4) when the motion is not filed until after the criminal prosecution has been disposed of; (5) when "the independent character of a summary proceeding for return of papers [is] so clear, that it will be deemed separate and distinct, even if a criminal prosecution against the movant is pending in the same court."[24] 278 U. S.

[23] Of course, orders *denying* motions to suppress are not final nor appealable, see p. 49, *infra*.

[24] The fourth category is supported by a reference to *Essgee Co.* v. *United States*, 262 U. S. 151; but that case reveals no characteristics of independence other than the fact that the petition was entitled as a separate matter and was referred to

225–6. Patently, the difference in this context between an order granting a motion to suppress which disposes of and severs that issue from the criminal case for all time, and an order denying such a motion which is not finally dispositive of any issue, is infinitely greater than the distinction made in *Cogen* between the order there held unreviewable and the many examples therein cited of separable, appealable proceedings. And, to the extent that the dictum in *Cogen* intimates a closer liaison between criminal cases and suppression matters generally, it has since been refuted by the effects of the *Rea* decision, *supra*, pp. 24–25 with its considerable extension of the scope of suppression orders. Cf. *Dier* v. *Banton*, 262 U. S. 147. Similarly, *United States* v. *Rosenwasser*, 145 F. 2d 1015 (C. A. 9), which held that an order of suppression was a part of the criminal case and not independently appealable because of its injunctive aspects, was decided before the *Rea* decision made manifest the very broad and general effects of an order of suppression under Rule 41 (e).

There may be some orders of suppression which are explicitly limited to the criminal case in which they are made and do not have the broad sweep of the usual order under Rule 41 (e). This Court, on the basis of the particular facts before it, found that to be the situation in *United States* v. *Wallace Co.*, 336 U. S. 793. That also was the situation in

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by the Court as a special proceeding. And the approval given in *Cogen* to *Dowling* v. *Collins*, 10 F. 2d 62 (C. A. 6) appears to be based solely on the fact that the petition there was nominally a plenary proceeding, though substantively it sought the suppression of evidence in a pending criminal case.

United States v. *Williams*, 227 F. 2d 149 (C. A. 4), where the court noted (p. 151) that the motion sought only the suppression of evidence in the criminal proceeding and the dismissal of the indictment, and ruled (p. 152) that the order would not preclude a new indictment and the use of the suppressed evidence on a trial thereof. That the Fourth Circuit does not regard all orders of suppression entered after indictment as interlocutory is shown by its subsequent decisions in *United States* v. *Ponder*, 238 F. 2d 825 (C. A. 4), where it indicated that such an order might even be appealable, after dismissal of the indictment, under the Criminal Appeals Act, 18 U. S. C. 3731. Indeed, the fact that in *Wallace* and *Williams*, *supra*, the decisions found it necessary to point to the particular circumstances which limited those orders to the criminal case indicates that, absent such circumstances, an order of suppression extends beyond, and is therefore separable from, the criminal case.

It is submitted that a rule which provided that a suppression order is plenary if no other proceeding is pending in which use of the property might be contemplated or possible, but that such an order is inextricably a part of the criminal case if somewhere—anywhere—a case is pending in which use of the property is threatened, would be neither logical nor reasonable. On the other hand, a rule which considered the suppression order independent and plenary regardless of the lack of pendency of proceedings elsewhere when the order in its effect goes beyond the criminal case is free from the otherwise existing contradictions, exceptions, and incon-

sistencies. The intrinsic character of the suppression decision, bolstered by the text and effect of Rule 41 (e), strongly suggest that such a ruling is independent of the immediate criminal case. On grounds of both logic and precedent it should be held to constitute the culmination of a plenary proceeding, appealable under 28 U. S. C. 1291.

B. EVEN IF INTERLOCUTORY, THE SUPPRESSION ORDER IS REVIEWABLE TREATING THE APPEAL AS A PETITION FOR A WRIT OF MANDAMUS

An alternative theory is suggested by the recent case of *La Buy* v. *Howes Leather Co.*, 352 U. S. 249. The Court there upheld the exercise by the Court of Appeals of its power to issue a writ of mandamus to compel a district judge to vacate orders entered under Rule 53 (b), F. R. Civ. P., referring antitrust cases for trial before a master. The orders in question concededly were interlocutory but the Court nevertheless felt that the writ setting them aside could properly issue. See, also, *State* v. *Coleman*, 58 R. I. 6, 190 A. 791, to the effect that an order to return property entered in a criminal case may be reviewed by certiorari. And see, *State* v. *Fleckinger*, 152 La. 337, 93 So. 115; and *Bandini Co.* v. *Superior Court*, 284 U. S. 8. Even assuming, *arguendo*, and contrary to the authorities cited in Point III, *infra*, pp. 51–53, that suppression orders do not meet the tests of finality or of separability, regard for practicalities and for the effective administration of justice [25] would dictate that the mandamus route be allowed if none other be

[25] See pp. 39–40 *infra*, fns. 38–40.

available to assure review of the important orders here involved.[26] While in the instant case the Government filed an appeal rather than a petition for a writ of mandamus, this Court could, as courts have done in the past, overlook the procedural pleading caption and consider instead its substance. See *Shapiro* v. *Bonanza Hotel Co.*, 185 F. 2d 777 (C. A. 9); *Steccone* v. *Morse-Starrett Products Co.*, 191 F. 2d 197 (C. A. 9).

III

THE ORDER OF THE DISTRICT COURT WAS A FINAL DECISION

A. GENERAL CONSIDERATIONS

As indicated *supra* pp. 13, 19, both Section 105 of Title 23 of the District of Columbia Code and 28 U. S. C. 1291 require as a jurisdictional prerequisite to an appeal that the order sought to be reviewed qualify as a "final decision." Our Point II, *supra*, pp. 19–30, relates in detail the factors which separate the suppression matter from the main criminal action. The conclusions there drawn apply even more strongly to establish that the order is final. Even if the suppression matter were not sufficiently independent of the criminal case in which it arises to qualify as a plenary proceeding outside the scope of 18 U. S. C. 3731, surely it has enough of the attributes of separability to satisfy the more modest requirements of the "final decision" concept. For obviously far fewer of the factors making for independence and separability

[26] As to the question whether the writ would need to be in aid of the appellate jurisdiction, see *Maryland* v. *Soper* (*No. 1*), 270 U. S. 9, 30, *McClellan* v. *Carland*, 217 U. S. 268, 279–80.

have to inhere in a decision to make it separable from the main cause of action, within the meaning of the finality requirements enunicated in *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541, 546, see pp. 41–43, *infra*, than are required to take such a decision wholly outside the stream of the criminal case and thus outside the scope of the Criminal Appeals Act. We here agree that an order suppressing evidence is sufficiently distinct from the criminal action to be considered independent and severable for both purposes; but without doubt it is sufficiently distinct from that action to qualify as a "claim * * * of right separable from, and collateral to, rights asserted in the action" under the meaning of the criteria fixing finality of decision within the meaning of 28 U. S. C. 1291 and *a fortiori* for purposes of Section 105 of Title 23 of the District of Columbia Code.

(Since an order on a motion to suppress and return property has never been construed to be encompassed within the limited category of appealable interlocutory decisions listed in 28 U. S. C. 1292,[27] the Government's right to appellate review is contingent upon the district court's order being classifiable as a "final decision" under 28 U. S. C. 1291 and Section 17–102 of the D. C. Code.)

Before reviewing in detail the law of finality, some of the principles and factors bearing thereon will be summarized generally.

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[27] It should be recognized, however, that an order denying the Government the right to use property in its possession as evidence in a case to which it is a party has obvious injunctive aspects. See 28 U. S. C. 1292 (1).

The meaning of the phrase "final decision" has been the subject of many attempts at definition, and "[p]robably no question of equity practice has been the subject of more frequent discussion in this court than the finality of decrees. * * * The cases, it must be conceded are not altogether harmonious. * * *"[28]—a statement which one commentator describes as notable for its "admirable restraint."[29] Closely tied with the difficulty of arriving at useful generalizations on this question is the fact that relatively slight changes in procedural facts frequently have changed the ultimate result.[30] It is clear that "final decision" is not synonymous with "final judgment," that is, a judgment which fully and completely terminates the litigation. *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541, 545; *cf. Sears, Roebuck & Co.* v. *Mackey*, 351 U. S. 427, 441 (separate opinion by Mr. Justice Frankfurter). Many orders, non-terminal in nature, are considered to be sufficiently final to qualify under Section 1291. The instant case is concerned solely with such an order.

A general policy of construction which emerges from the cases is that practical, rather than purely abstract, theoretical considerations determine categorization in this context. As this Court has stated in *Cobbledick* v. *United States*, 309 U. S. 323, 326:

> For purposes of appellate procedure, finality—the idea underlying "final judgments and

[28] *McGourkey* v. *Toledo & Ohio Railway*, 146 U. S. 536, 544–5.

[29] Crick, *The Final Judgment As a Basis For Appeal*, 41 Yale L. J. 539, 540.

[30] *E. g., Kyle* v. *United States*, 211 F. 2d 912 (C. A. 9).

> decrees" in the Judiciary Act of 1789 and now expressed by "final decisions" in § 128 of the Judicial Code—is not a technical concept of temporal or physical termination. It is the means for achieving a healthy legal system. * * *.

Moreover, because of the great importance of the right of appeal, "[t]he words 'final decisions,' like the equivalent 'final judgments and decrees' in former acts regulating appellate jurisdiction, have not been understood in a strict and technical sense, but have been given a liberal and reasonable construction." *Beneficial Industrial Loan Corp.* v. *Smith,* 170 F. 2d 44, 49 (C. A. 3), affirmed *sub nom. Cohen* v. *Beneficial Loan Corp.,* 337 U. S. 541. Thus, the tendency has been to soften rigid barriers to appealability; to permit rather than to prevent an appeal in an occasional borderline situation; to assume the risk of error in the direction of liberality of reviewability. Cf. *La Buy* v. *Howes Leather Co.,* 352 U. S. 249 discussed *supra* at p. 30.

As concerns the finality of the type of order in this case, direct precedent is not greatly illuminating. On the one hand, the Court of Appeals for the District of Columbia Circuit, upon finding that the accused's "claimed right to have the [property] returned to him 'is not an ingredient of' and 'does not require consideration with' the criminal charge against him;" concluded that suppression orders are final and appealable. *United States* v. *Cefaratti, supra,* 202 F. 2d at 16. On the other hand, *United States* v. *Rosenwasser,* 145 F. 2d 1015 (C. A. 9) and *United States* v. *Janitz,* 161

F. 2d 19 (C. A. 3), are representative of the other view that such orders constitute but interlocutory steps in the criminal case, a mistaken premise discussed *supra* at pp. 20–26.[31] This lack of definitive precedent[32] in-

[31] The few other decisions which have dealt with this problem are not very satisfactory as precedents. *United States* v. *Kirschenblatt*, 16 F. 2d 202 (C. A. 2), assumes without discussion that suppression orders are appealable. *United States* v. *One 1946 Plymouth Sedan*, 167 F. 2d 3 (C. A. 7), a civil forfeiture case, was decided on the issue of *res judicata* and refers to the finality problem only by way of dictum. And even the *Janitz* case, *supra*, is not directly in point for there (1) the defendants were apparently in jeopardy, and (2) the court was primarily concerned with appealability under the Criminal Appeals Act rather than with the specific finality problem here involved.

[32] Petitioners refer to a statement submitted on behalf of the Department of Justice in connection with hearings held by a subcommittee of the Senate Judiciary Committee which quoted only the *Janitz* decision and its supposed holding that suppression orders are interlocutory, as if such quotation constituted an indorsement of the *Janitz* view. (Br. 7, note 7). But during the same hearings, representatives of the Department not only drew the attention of the committee to the conflicting views held by the various courts of appeals, but also referred to the *Cefaratti* decision specifically and by name. There was discussion with respect to the uncertainty as to the proper rule in view of the split in the lower courts and absence of an authoritative ruling by this Court, and the Chairman accordingly indicated that whatever legislation would be enacted should not be viewed as impairing, in any way whatever, rights of appeal the Government might be construed to have under existing laws. Hearings on S. 3760, 84th Cong., 2d Sess., Subcommittee on Improvements in the Federal Criminal Code of the Senate Judiciary Committee, pp. 39–40. The Act ultimately passed reflects this view. Narcotic Control Act of 1956, 18 U. S. C. A. 1404, 70 Stat. 573: ("*In addition to any other right to appeal*, the United States shall have the right to appeal * * *" in the instances listed.) (Emphasis added.)

duces an examination of the specific constituent elements of a "final decision."

While sometimes overlapping and frequently less than fully-developed reasons have been assigned for either allowing or not allowing appeals to be taken, two general tests for finality have become crystallized in the decisions: (1) But for an immediate appeal will there be any subsequent opportunity for effective review? (2) Were important rights, fairly severable from the larger issues of the cause proper, finally disposed of by the decision? In the view of the Government, the decision here involved meets both of these tests—hence it is "final."

B. OPPORTUNITY FOR EFFECTIVE REVIEW AT A LATER STAGE

We will first deal with the consideration universally held to be foremost in importance in determining appeal-finality: that, unless an appeal is allowed from the decision from which review is sought, there will not be any review of such decision, or at least none that is effective.[33] Mr. Justice Frankfurter summarized the teaching of many decisions when he recently stated that "the Court has permitted appeal before completion of the whole litigation when failure to do so would preclude any effective review or would result in irreparable injury."[34]

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[33] This consideration has sometimes been cited as justifying without more a finality-appealability determination—as in the cases discussed under this subheading; in other decisions it is referred to as but one of the relevant factors. But without question it is by far the most important single consideration.

[34] *Sears, Roebuck & Co.* v. *Mackey*, *supra*, 351 U. S. at 441.

In *Cobbledick* v. *United States*, 309 U. S. 323, 324–5, 328, this Court observed that "[f]inality as a condition of review * * * has been departed from only when observance of it would practically defeat the right to any review at all"; and that when, for example, not to allow an interruption of proceedings to adjudicate the validity of a contempt citation "would forever preclude review of the witness' claim," an immediate appeal is permitted.

Likewise, in *Perlman* v. *United States*, 247 U. S. 7, an order denying a petition to prohibit the use before a grand jury of certain impounded exhibits was held to be final on the ground that, as the Court interpreted the decision in *Cobbledick*, 309 U. S. at 328–9:

> To have denied him opportunity for review on the theory that the district court's order was interlocutory would have made the doctrine of finality a means of denying Perlman any appellate review of his constitutional claim. Due regard for efficiency in litigation must not be carried so far as to deny all opportunity for the appeal contemplated by the statutes.

In other decisions as well, the question of whether opportunity for subsequent effective review would be available if the order at issue were held to be non-final has been cited as a cornerstone of the law of finality, and whenever lack of such opportunity has been apparent, a conclusion that finality was present has followed almost as a matter of course. Examples of this process are such leading cases as *Cohen* v. *Beneficial*

Loan Corp., 337 U. S. 541;[35] and *Swift* v. *Compania Caribe*, 339 U. S. 684.[36]

The decision rendered in the instant case provides a clear example of the impossibility not only of securing effective review except by the appeal here under attack, but of securing other review of any kind; for the Government obviously cannot appeal from either an acquittal or a conviction obtained without the suppressed evidence.[37] Petitioners suggest that public policy dictates this result. That is not so.

The problem here does not involve jeopardy, either technically or actually. The petitioners were never subjected to a criminal trial, with its burdens and difficulties, or to any portion thereof. Accordingly, this case is wholly without the considerations which have led, as a matter of protection against double jeopardy, to the preclusion of review of legal decisions made in the course of a trial. When there has been

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[35] "But this order of the District Court did not make any step toward final disposition of the merits of the case and will not be merged in final judgment. *When that time comes, it will be too late effectively to review the present order, and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably.*" 337 U. S. at 546. (Emphasis added.)

[36] "Appellate review of the order dissolving the attachment at a later date would be an empty rite after the vessel had been released and the restoration of the attachment only theoretically possible. * * * Under these circumstances the provision for appeals only from final decisions in 28 U. S. C. § 1291 should not be construed so as to deny effective review of a claim fairly severable from the context of a larger litigious process." 339 U. S. at 689.

[37] The Government here offered to stipulate that, if the order of suppression should ultimately be sustained, the indictment would of necessity be dismissed. See p. 51, *infra*.

no jeopardy, there is no public policy which forbids scrutiny by appellate courts of legal decisions which may decisively affect the outcome of criminal prosecutions. On the other hand, there would appear to be a very considerable public interest in not foreclosing such scrutiny and the very possibility of scrutiny, with whatever bearing it may have upon the exercise of judgment of lower courts. Also, court decisions affect not merely the cases in which they are rendered; the opinions which accompany them may lay down rules of law applicable to many other cases. If such decisions and opinions are based upon erroneous conceptions of law, and if they are removed from appellate scrutiny, then the errors which they embody may become enshrined, perpetuated, and repeated over long periods of time (unless and until some other method for bringing them to the attention of the appellate courts can be found).[38] The district courts are entitled to guidance in the admittedly difficult field of search and seizure. Cf. *Brinegar* v. *United States,* 338 U. S. 160. If they cannot obtain such guidance, the result will be a chaotic condition, with some judges in a single district consistently adhering to one view of the law, and others to another, incompatible, view.[39]

[38] In the instant case, for example, the opinion of the Court of Appeals indicates that the District Court was in error when it continued—in spite of the contrary guideposts laid down by this Court and the Court of Appeals— to adhere to its views as to the law of search and seizure which it had first expressed in *United States* v. *Johnson*, 113 F. Supp. 359 (D. D. C.). Cf. *La Buy* v. *Howes Leather Co.*, 352 U. S. 249 *supra*, p. 30.

[39] *E. g.*, compare, *United States* v. *Lewis*, 87 F. Supp. 970 (D. D. C.), reversed on other grounds, 184 F. 2d 394 (C. A. D. C.), and *United States* v. *Sullivan*, 116 F. Supp. 480 (D. D. C.), af-

All of these undesirable consequences are compelled neither by overriding legislative mandate nor by strong policy considerations. Of course, the policy expressed in the Fourth Amendment that individual rights be protected from police intrusion must be accorded great weight.[40] But that policy is hardly promoted by erroneous decisions with respect to the propriety of police action, or, as in this case, the legality of the action of the judicial officer who issued the warrants. Law enforcement, especially when it is guided and authorized by judicial action, should not be arrested and frustrated by other judicial action, without some opportunity for appellate consideration of the disputed issues.[41]

If there were no reason other than that the only review of the District Court decision that could ever be had is the review procedure here employed, a ruling declaring that decision to be a final one would be amply justified.

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firmed, 219 F. 2d 760 (C. A. D. C.), with *United States* v. *Stephenson*, 121 F. Supp. 274 (D. D. C.), appeal dismissed, 223 F. 2d 336 (C. A. D. C.).

[40] The instant case was not one involving intransigeant and overzealous officers bent upon making arrests and conducting searches irrespective of the rights of citizens. The police here went through all of the steps required by law, including an extended period of observation of the suspects' activities, followed by the submission of sworn statements to a judicial officer, with the arrests and searches occurring only after warrants had been duly issued by the United States Commissioner.

[41] It is relevant to this discussion to recall that the rules relating to the suppression of illegally seized property, in their evidentiary consequences, are extrinsic to the pure ascertainment of truth.

C. AN IMPORTANT, INDEPENDENT, SEVERABLE RIGHT IS INVOLVED

In addition to the pre-eminent question of opportunity, or lack of opportunity, for later effective review, the courts have been motivated by a number of other considerations, perhaps most cogently summarized in *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541. There, a stockholder had brought a derivative action alleging that the corporation and its officers were engaged in a conspiracy to enrich themselves. A New Jersey statute provided that in this type of action a plaintiff with small holdings in the corporation could be required to give security for reasonable expenses and attorneys' fees. The corporation moved to require such security. The District Court was of the opinion that the state statute was not applicable to an action pending in federal court. The Court of Appeals reversed, and that reversal was affirmed by this Court, which held, *inter alia,* that the District Court order refusing to apply the statute was final and appealable. This Court wrote, 337 U. S. at 545–7:

> Title 28 U. S. C. § 1291 provides, as did its predecessors, for appeal only "from all final decisions of the district courts," except when direct appeal to this Court is provided. Section 1292 allows appeals also from certain interlocutory orders, decrees and judgments, not material to this case except as they indicate the purpose to allow appeals from orders other than final judgments when they have a final and irreparable effect on the rights of the parties. It is obvious that, if Congress had allowed appeals only from those final judgments which

terminate an action, this order would not be appealable.

The effect of the statute is to disallow appeal from any decision which is tentative, informal or incomplete. Appeal gives the upper court a power of review, not one of intervention. So long as the matter remains open, unfinished or inconclusive, there may be no intrusion by appeal. But the District Court's action upon this application was concluded and closed and its decision final in that sense before the appeal was taken.

Nor does the statute permit appeals, even from fully consummated decisions, where they are but steps towards final judgment in which they will merge. The purpose is to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results. But this order of the District Court did not make any step toward final disposition of the merits of the case and will not be merged in final judgment. When that time comes, it will be too late effectively to review the present order, and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably. We conclude that the matters embraced in the decision appealed from are not of such an interlocutory nature as to affect, or to be affected by, decision of the merits of this case.

This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to

> require that appellate consideration be deferred until the whole case is adjudicated. The Court has long given this provision of the statute this practical rather than a technical construction. *Bank of Columbia* v. *Sweeny*, 1 Pet. 567, 569; *United States* v. *River Rouge Co.*, 269 U. S. 411, 414; *Cobbledick* v. *United States*, 309 U. S. 323, 328.
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> We hold this order appealable because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it. * * *

Thus, to the paramount consideration whether any review at all will be possible if review is not allowed at once, *Cohen* adds that decisions are appealable also if they finally determine rights of significant importance which are collateral to and fairly severable from the main cause of action. This, too, was the test used by the Court of Appeals in *United States* v. *Cefaratti*, *supra*, upon which its decision in the instant case is bottomed;[42] and based upon that test the court found—both in *Cefaratti* and here—that an order granting a pretrial motion to suppress is appealable. There can be no dispute as to the propriety of the criteria used below for measuring finality.[43] Peti-

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[42] In *Cefaratti*, the majority of the court stated through Judge Edgerton that in its view a decision meets the test of finality if "(1) it has 'a final and irreparable effect on the rights of the parties', being 'a final disposition of a claimed right'; (2) it is 'too important to be denied review'; and (3) the claimed right 'is not an ingredient of the cause of action and does not require consideration with it.'" 202 F. 2d at 16.

[43] Particularly in view of the fact that the finality rule of *Cohen* and related decisions applies equally to criminal as to civil cases. See *Stack* v. *Boyle*, 342 U. S. 1 (a bail case in

tioners' complaint is that the Court of Appeals erred in holding that the decision appealed from measured up to such standards.

Three factors were said in *Cohen* to determine finality of a decision: (1) relationship of the decision to the principal cause of action; (2) importance of the decision; and (3) effect of the decision on a right of the losing party. The challenged order meets these three facets of finality.

1. Relationship of the decision to the principal cause of action

As we have indicated *supra* at pp. 20–26, there is a sharp factual, legal, and procedural separation between the issue of guilt or innocence on the one hand and the suppression matter on the other. Rule 41 (e), F. R. Cr. P., is intended to and does operate so as to create a wide gulf between the two proceedings. Additionally, under the principle of *res judicata,* the Government is bound by a determination that property was illegally seized by its agents, hence that it is not usable as evidence. Once it has been determined that the property was invalidly seized, that determination stands unassailable forever, unless overturned by a higher court on appeal. *Steele* v. *United States No. 2,* 267 U. S. 505, 507. The fact that the United States is so bound would seem to suggest strongly that a proceeding culminating in a final decision was involved. For to bind the Government by way of *res judicata* to a determination that the property was

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which the Court relied directly upon *Cohen* in deciding that an order denying a motion to reduce excessive bail was a "final decision").

illegally seized, without affording an opportunity to test the soundness of the determination by the possibility of appeal, would be an extraordinary result, absent some overriding policy mandate—which, as we have seen, is not here present."[44]

The conclusion that the suppression matter is at least sufficiently distinct from the main issues in the criminal case to satisfy the finality criteria of *Cohen* is further buttressed by two cases in fairly analogous postures, *Stack* v. *Boyle, supra* (342 U. S. 1), and *Swift & Co.* v. *Compania Caribe, supra* (339 U. S. 684).[45] In *Stack,* this Court ruled that a post-indictment order denying a motion to reduce bail was a final and appealable decision. In *Swift,* the Court determined that an order providing for dismissal of a libel and vacation of a foreign attachment of a vessel

[44] It is apparently to avoid just such an injustice that strangers to the criminal case are allowed to appeal from decisions regulating the custody of property although the main case is not yet at an end. *Gumbel* v. *Pitkin,* 113 U. S. 545; *Ex parte Tiffany,* 252 U.S. 32; cf. *Cogen* v. *United States,* 278 U. S. 221, 225. The rationale of the holdings which permit these appeals appears to be that as to the stranger an independent proceeding has come to an end because he is finally hurt by the decision. In the instant case the Government is in the same position—it should receive the benefits of the same rationale.

[45] On the other hand, *Baltimore Contractors* v. *Bodinger,* 348 U. S. 176, upon which petitioners rely, is not in point. That case involved an interpretation of 28 U. S. C. 1292 (1), dealing with interlocutory orders—not the here relevant section 1291. In *Bodinger,* certiorari was sought on the question whether "an interlocutory order" of the district court refusing a stay of a state action for an accounting should be considered a denial of an injunction from which an appeal lies under section 1292 (1).

on a negligence claim likewise was subject to immediate review. If the question of bail is so separate from the criminal cause as to be final and appealable, then an order suppressing property entered at the same stage of the proceedings would appear properly to belong in the same category. And the vacating of an attachment bears an even closer resemblance, with respect to severability from the ultimate merits, to a suppression of evidence. Both it and the suppression ruling may be said to be somewhat intermediary to adjudication of the cause of action itself, but, as the Court said in *Swift* (p. 689), "appellate review of the order dissolving the attachment at a later date would be an empty rite after the vessel had been released and the restoration of the attachment only theoretically possible."[46] The same may be said of appellate review after a motion to suppress has been granted, if indeed appellate review were at all possible in criminal cases after the attachment of jeopardy. Moreover, the *Swift* attachment has vitality only because of the

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[46] *Swift* likewise disposes of the oft-repeated assertion that a proceeding cannot be appealable or non-appealable depending upon whether the relief requested ultimately is granted or denied. As Mr. Justice Frankfurter stated for a unanimous Court, "* * * the provision for appeals only from final decisions in 28 U. S. C. § 1291 should not be construed so as to deny effective review of a claim fairly severable from the context of the larger litigious process. * * * The situation is quite different where an attachment is upheld pending determination of the principal claim. * * * In such a situation the rights of all the parties can be adequately protected while the litigation on the main claim proceeds." 339 U. S. at 689. See also, *Commonwealth* v. *Rich*, 174 Pa. Super. 174, 100 A. 2d 144, certiorari denied, 347 U. S. 966, and *Catlin* v. *United States*, 324 U. S. 229, 236. See p. 14, *supra*.

pending libel; it would be a nullity but for the main cause of action. By that standard, the suppression matter is considerably more independent of the criminal case, if only for the fact that on occasion—as here [47]—it is coupled with a request for return of property, which, under any view, prays for very distinct relief.

Consequently, both on logic and on precedent it is evident that an order of suppression is, in the words of *Cohen,* a determination of a claim of right "separable from, and collateral to, rights asserted in the action"—hence that it qualifies under one of the important criteria of finality formulated by that decision.

2. Importance of the decision

Little argument is required to demonstrate compliance with the second requirement of *Cohen,* that of public importance. Leaving to one side for the moment the wide-ranging collateral consequences discussed *supra* at pp. 24–26, even in its narrowest effects a decision suppressing evidence is of obvious significance as it may frustrate at the very threshold a prosecution for violation of the criminal laws of the United States. The public stake in the due administration of justice is greatly affected by a decision which prevents the trial from ever commencing, let alone being carried to a conclusion by verdict. Such a decision is too important to be denied review.[48]

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[47] See p. 21, n. 17.

[48] Compare *State* v. *McNichols*, 62 Idaho 616, 115 P. 2d 104, where an order entered after conviction which directed the return of seized and forfeited property was held to be appealable as affecting "the substantial rights" of the state.

3. Effect of the decision on a right of the losing party

Likewise there can be no real doubt that an order granting a defense motion to suppress has a final and an irreparable effect on rights of the Government. Rule 41 (e) states that "If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial." Consequently, it cannot be said of the Government that it may, as the defendant can, by renewal of the motion at trial, obtain reconsideration of the adverse ruling, either for the purpose of gaining admission of the property into evidence, or for the purpose of preserving the point for ultimate appeal (even assuming that the double jeopardy clause did not preclude an appeal from an acquittal). If, prior to trial, the seized property is ordered returned, it is physically unavailable for a proffer. If it is not returned, were the trial judge to attempt to admit what had previously been suppressed—as he can refuse admission to evidence as to which another judge had previously overruled a motion to suppress—he would be in contravention of the specific injunction of the Rule. Thus, whether returned, or suppressed but not returned because otherwise subject to lawful detention, the property is unavailable for trial.

In short, as far as the Government is concerned, it cannot be maintained, as in the instance of a defendant, that an order for the suppression or return is simply an advance trial ruling, of a tentative nature, which of necessity the trial judge will be required to consider again at the time the evidence is offered.

For that reason, such cases as *Cogen* v. *United States, supra,* upon which petitioners so heavily rely, have no applicability here. The crux of the *Cogen* decision, which held that the *denial* of a motion to suppress was interlocutory and not appealable, lies in this reasoning of the Court, 278 U. S. at 224:

> It is not true that the decision on such a motion for the return of papers necessarily settles the question of their admissibility in evidence. If the motion is denied, the objection to the admissibility as evidence is usually renewed when the paper is offered at the trial. And, although the preliminary motion was denied, the objection made at the trial to the admission of the evidence may be sustained. For as was said in *Gouled* v. *United States,* 255 U. S. 298, 312–313: "* * * where, in the progress of a trial, it becomes probable that there has been an unconstitutional seizure of papers, it is the duty of the trial court to entertain an objection to their admission or a motion for their exclusion and to consider and decide the question as then presented, even where a motion to return the papers may have been denied before trial." Upon a review of the final judgment against the defendant, both the refusal to order return of the property and its admission in evidence are commonly assigned as errors.

This, then, was the primary reason [49] for the result reached in the *Cogen* matter: that an order *denying*

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[49] A secondary reason, though not stated as explicitly, was that upon review of the final judgment of conviction, the preliminary order may be assigned as error. Obviously, that justification, too, is not here available, for (1) the Government

suppression and return of property is interlocutory because it does not necessarily settle the question of evidentiary admissibility, since the defendant has a right to renew the motion at trial, at which time it may be granted. This is but a restatement of the general principle that where a court has the power of reconsideration its judgment has no finality. *Zimmern* v. *United States,* 298 U. S. 167; *Suggs* v. *Mutual Beneficial Health,* 115 F. 2d 80 (C. A. 10). But the same reasoning is not applicable to an order *granting* a suppression motion, for it is not renewable; consequently, the rule flowing directly from that reasoning should not be applied to it.[50] See also *Cohen* v. *Beneficial Loan Corp.,* 337 U. S. 541, at 546.

Petitioners suggest that there was no final effect in this case because the prosecution could have proceeded with the trial without the excluded evidence. But this does not meet the real issue. As concerns the property here involved, the ruling of the District

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may not appeal from an acquittal, and (2) in most cases—certainly here—the Government cannot even go forward with its case to a resolution of the issue of guilt or innocence, because the suppression order will have deprived it of its evidence. See pp. 51–52, *infra.*

[50] The Court of Appeals for the District of Columbia Circuit, whose ruling and reasoning are here at issue, is acutely conscious of the paramountcy of the question of availability of reconsideration. Judge Edgerton, the author of the *Cefaratti* opinion, recently wrote for the court in *United States* v. *Stepenson, supra* (223 F. 2d 336) that a suppression order based not on the Fourth Amendment and on Rule 41, but upon 47 U. S. C. 605 (the "wire tap" statute) and the rule of *Nardone* v. *United States,* 302 U. S. 379, is not appealable because, unlike in the illegal search and seizure situation, the "District Court may decide to admit, at the trial, the evidence it has suppressed before trial."

Court was final and irreparable regardless of what might transpire at the trial. The fact that the Government might be able to go to trial in a criminal case without the suppressed and returned evidence is immaterial to the finality of the order because as to the property suppressed there is no further recourse.

Moreover, in this case as in many others, the Government was not able to proceed without the suppressed property. The inevitable effect of the District Court decision was to emasculate the Government's case so as to render a dismissal of the indictment inevitable. The United States formally spread upon the record its inability to go forward with a trial without the property involved.[51] The Government offered to stipulate (R. 33) that if the order of suppression entered in the District Court ultimately were upheld it would not be in possession of sufficient evidence to go forward and consequently would dismiss the indictment.

That this was not an empty assertion is indicated by the very nature of the offenses. The indictment charged petitioners with promoting a lottery in violation of Title 22, Section 1501, District of Columbia Code; conspiring so to do, in violation of Title 18, Section 371, United States Code; and possessing numbers slips, in violation of Title 22, Section 1502, District of Columbia Code. The property suppressed em-

[51] In *United States* v. *Cefaratti*, *supra*, the Government went further and actually moved for dismissal of the indictment before taking an appeal. But in the instant case, the Court of Appeals—correctly, we think—did not insist on that formality as a prerequisite for the attachment of appellate jurisdiction.

braced all of the lottery and numbers paraphernalia associated with these petitioners. Without physical introduction into evidence of the paraphernalia it would not be feasible to try the petitioners for the offense of possession of numbers slips. Similarly, under any realistic view, neither of the other two offenses could be shown if the seized property were unavailable at the trial.[52]

At least an analogy exists between the suppression-of-evidence cases and the situation covered by such cases as *Foray* v. *Conrad*, 6 How. 200, where an order which set aside a conveyance of land and directed an accounting was held to be final. Its rationale—and that of the many decisions which have followed it—has been expressed to be that "a judgment directing immediate delivery of physical property is reviewable and is to be deemed disassociated from a provision for an accounting even though that is decreed in the same order," [53] undoubtedly because "if appellants had to wait, they would be subjected to irremediable injury, for execution had been awarded." [54]

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[52] The possession of lottery slips gives rise to a presumption of promotion of a lottery in violation of 22 D. C. Code 1501. That presumption usually supplies the most vital evidence. And, of course, the fact that trial of the "possession" count is frustrated without the suppressed property gives the Government sufficient standing to assert irreparability, hence, the independence, of the order.

[53] *Radio Station WOW* v. *Johnson*, 326 U. S. 120, 126.

[54] *Id.* at 125, note 2. Compare also, *In re Pillo*, 11 N. J. 8, 93 A. 2d 176, 179, where it was held that an order adjudging that a grand jury witness was not required to answer certain questions was appealable, for "[I]f the orders stand, they ter-

Since the order of the District Court had a final and irreparable effect on the right of the Government to hold and to use the property seized pursuant to the warrants; since the right affected and impaired by the order is an important one to the parties, to the public, and to the due administration of justice; and since the claim of right of the Government is collateral to and separable from the rights, claims, and issues involved in the cause of action—the order of the District Court is a "final decision," subject to appeal pursuant to 28 U. S. C. 1291 and *a fortiori* to review under Section 105 Title 23 of the District of Columbia Code.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals be affirmed.

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minate the proceedings as to the questions at issue and so are final in quality, appealable * * * as final judgments * * *."

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